IN THE COURT OF APPEALS OF IOWA

No. 1-019 / 10-0418
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERIN DOUGLAS MOOTZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Douglas C. McDonald, District Associate Judge.

Defendant appeals his conviction for assault on a police officer causing bodily injury. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Michael J. Walton, County Attorney, and Dion Trowers, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Potterfield, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, C.J.

Defendant, Jerin Mootz, appeals from the judgment and sentence entered upon a jury verdict finding him guilty of assault on a police officer causing bodily injury, in violation of Iowa Code section 708.3A(3) (2009). Mootz contends the district court erred in denying his peremptory strike of a minority juror. We find error, but consider it harmless. Therefore, we affirm.

I. Background Facts and Proceedings.

On June 6, 2009, a fight broke out in the back of the Phil and Larry's Saloon in Davenport. The fight moved outdoors and the police were called. Officer Epigemenio Canas, who is Hispanic, was dispatched to the location where he observed ten to fifteen people outside pushing, yelling, and screaming. He took into custody a Hispanic male who appeared to be an instigator and attempted to take custody of others when he saw a man quickly approaching him with a raised fist. The officer attempted to avoid a punch by turning his head to the side, but was unable to deflect it. He was struck above his right eye and received a laceration. The attacking gentleman, Jerin Mootz (Mootz), lost his balance and fell. Officer Canas positioned himself on top of Mootz and delivered several reactionary strikes with his fist in order to gain control of Mootz. Officer Canas's injuries required five stitches over his right eye. He also testified he experienced swelling in his cheek, pain and swelling in his right hand, and pain in his upper shoulder and neck.

Mootz was charged with assault on a police officer causing bodily injury. The case came to trial on February 8, 2010. Mootz waived the recording of voir

dire; however, based on a subsequent court record, we are able to determine that the court advised the parties in a sidebar following voir dire it observed three minority people on the jury panel including two Hispanic males. The court advised the State and Mootz it considered one of the Hispanic males "strikeable" because the juror stated he was related to two area law enforcement people and had medical problems that affected his ability to serve on the jury that day. However, the court advised the parties before they began to exercise their peremptory challenges that it had "heard no sufficient reason" during voir dire that these other minority jurors should be stricken.

Mootz struck the first male Hispanic juror that the court considered "strikeable" and then sought to strike a second Hispanic male as well. The court then on the record outside the presence of the jury asked the State whether it objected to Mootz striking this second juror. The State responded it did object because the juror gave no indication why he could not serve. In response, Mootz argued first he had no obligation to justify why he was striking this juror. Secondly, Mootz argued he had good reasons to strike the juror as the juror was a former bartender who said he knew about intoxication,[1] and the juror also stated he had previously been arrested and the juror said he thought he deserved it. Mootz argued,

> There's a lot of reasons why this man should not be on this particular jury. But I certainly have a legitimate reason to strike him beyond the fact he is Hispanic.
>
> I might add that there are two other minorities on this panel . . . . [B]oth black women who remain on this panel. I don't

[1] Mootz was also charged with public intoxication and interference with official acts. Mootz was found not guilty of public intoxication, but found guilty of interference with official acts. Mootz does not appeal these charges.

> have a bias toward anyone here except as to what I believe may be a prejudice position or a prior experience that is going to affect my client's ability to get a fair trial. When the man says that the police cuffed him and he deserved it, I think that's enough for me. . . .
>
> So I would request the court to allow the peremptory strike of [this juror] to stand. I know of no authority and I think the State ought to give us some legal authority for the proposition that I can't do this.

The court refused to allow Mootz to strike the juror stating:

> Well, that is the rule. You have to have a reason to do it. He answered the questions fairly. He said as a teenager he had problems, he was speeding or something, and the best I could hear him he said the police had stopped him and he deserved it or whatever. It didn't sound like it was anything very serious. It was kid stuff. So those weren't sufficient reasons to challenge him. I am not going to—we have a police officer who is a Hispanic and we make it a point to make sure that minorities are treated fairly like everyone else on our jury panels and I think that's important and that applies to both the Defendant and the State.
>
> So I'm not going to allow you to strike [this juror]. So you need to strike somebody else on the list and [this juror] will be allowed to serve.

Under objection, Mootz struck another juror and the jury panel was sworn.

After the first two witnesses testified, the court broke for lunch. After lunch, but before the jury returned, Mootz made a motion for a mistrial on the basis he was denied his right to strike the juror. Mootz asserted he had the absolute right to make his peremptory challenges and he offered a race-neutral reason to strike the juror in question. He argued the court action compelling him to leave this juror on the panel denied him his Sixth Amendment right to a fair trial. The court responded,

> All right. Well, you have made a record on it. My belief is that that rule applies to both parties. And we went for years here with white juries and people were excluded for racial—obviously racial reasons, and a stop has been put to that. We have an officer that was assaulted here, a victim, and he is of a Hispanic

> background and I think that it's fair that we have a proper mixture of backgrounds on the jury as far as both sides are concerned. There was no valid reason given for excluding him. He indicated that he could be fair. He had some experience with the police when he was younger. He deserved, in his opinion, what he got and he didn't show any bias one way or the other. Anyway, your record has been made on it, but I'm going to maintain my position on it.

The jury ultimately found Mootz guilty of assault on a police officer causing bodily injury.

Mootz made a motion for a new trial on February 17, 2010, asserting the court improperly denied him his right to strike the juror in question. In his motion Mootz brought to the court's attention that there were three Hispanic jurors on the panel, not two as the court originally thought. This third juror identified herself as Hispanic on the juror information sheet and Mootz made no attempt to strike her. The motion was set for hearing on February 24, 2010.

At the hearing, the court clarified it did not identify the female juror as Hispanic in the initial court proceeding because it did not have the juror information sheet at the time and the juror did not have a Hispanic last name. The court went on to articulate the reasons it did not allow the juror in question to be stricken.

> [H]e had been a bartender earlier in his life out east somewhere . . . . We don't know any more details than that about it. He said he'd had his share of problems with police when he was younger, but he had no—no ongoing disputes over what they did, so I didn't feel that that was a sufficient reason to—that the peremptory challenge should be exercised on him, because it's important to us that we have a jury—we have juries that are, you know, selected not on the basis of race, but on—on the kind of answers that they give. . . .
>
> . . . .
>
> I just didn't hear any reasons at all that would justify striking him or challenging him.

Mootz asserted the State had the burden to show the reason he gave for striking this juror was pre-textual and failed to meet this burden. Mootz claimed he did in fact leave on the female Hispanic juror demonstrating he was not striking jurors based on race. Mootz stated he gave two good reasons to strike this juror that were race-neutral and the State failed to demonstrate he struck the juror for racially discriminatory reasons.

The court responded,

> I heard no reasons why—no legitimate reasons why that you would have a real issue with [this juror] in serving, and I did it on my own, without the State's request. I think it's important to the overall justice of our system, the fairness of our system, that we not discriminate against people and make them—make the jurors feel that they are second-class citizens in any respect, because they aren't.

The court asked the State at this point what its position was on the issue. The State asserted it felt it was the judge's responsibility to make sure jury selection was done in a fair and legal manner. Mootz conceded the court had the right to bring up the issue in the manner in which it did because the Supreme Court has left the ultimate decision on whether peremptory strikes are being used in a discriminatory manner to the trial judge. But Mootz asserted he did provide race-neutral reasons for his strike and the State offered nothing to rebut it. The court ultimately ruled it did not believe Mootz gave race-neutral reasons for striking the juror; and therefore, denied Mootz's motion for a new trial.

Mootz was sentenced on the charge of assault on a police officer causing bodily injury to an indeterminate term of two years and the court imposed a fine of $1500. On March 15, 2010, Mootz filed his notice of appeal.

II. Standard of Review.

Because Mootz asserts his constitutional rights were violated, our review is de novo. *State v. Veal*, 564 N.W.2d 797, 806–07 (Iowa 1997) (partially overruled on other grounds by *State v. Hallum*, 585 N.W.2d 249 (Iowa 1998)). However, a trial court's finding of purposeful discrimination in jury selection depends largely on the evaluation of credibility; and therefore, a reviewing court should give these findings great deference. *State v. Knox,* 464 N.W.2d 445, 448 (Iowa 1990) (citing *Batson v. Kentucky*, 476 U.S. 79, 98 n.21, 106 S. Ct. 1712, 1724 n.21, 90 L. Ed. 2d 69, 89 n.21 (1986)).

Mootz also argues the trial court erred when it refused to allow him to use his peremptory strike. He claims the court misapplied the law by shifting the burden to the proponent of the strike to prove the strike was not racially motivated. In addition, he claims the trial court erroneously applied the wrong standard for evaluating peremptory strikes. These claims are reviewed for errors at law. Iowa R. App. P. 6.907.

III. Analysis.

The United States Supreme Court has held the Equal Protection Clause of the Fourteenth Amendment prohibits the State from using peremptory strikes to challenge potential jurors solely on the basis of their race. *Batson,* 476 U.S. at 89, 106 S. Ct. at 1719, 90 L. Ed. 2d at 83. *Batson* has repeatedly been accepted and applied in our state over the past twenty-five years.[2] While our courts have addressed the application of *Batson* on a number of occasions, we have never

[2] *Kiray v. Hy-Vee, Inc.*, 716 N.W.2d 193, 205–07(Iowa Ct. App. 2006); *State v. Griffin*, 564 N.W.2d 370, 375–76 (Iowa 1997); *Veal*, 564 N.W.2d at 806–07; *Knox*, 464 N.W.2d at 448; *State v. Watkins*, 463 N.W.2d 411, 414-15 (Iowa 1990).

applied *Batson* where the defendant, as opposed to the State, was challenged in his use of peremptory strikes; where the court sua sponte, as opposed to a party, initiated the *Batson* challenge; where the court directs the parties which jurors can be stricken before peremptory strikes are exercised; and ultimately what remedy should be applied, if an error is found. We address each of these issues in turn.

A. Can a Defendant Be Subjected to a *Batson* Challenge?

While the parties did not raise this issue we believe that a defendant can be subject to a Batson challenge. We note that in *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S. Ct. 2348, 2359, 120 L. Ed. 2d 33, 51 (1992) the United States Supreme Court ruled:

> [T]he Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges. Accordingly, if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must articulate a racially neutral explanation for peremptory challenges.

McCollum, 505 U.S. at 59, 112 S. Ct. at 2359, 120 L. Ed. 2d at 51.[3] Thus, we find in this case the defendant along with the State may not use peremptory

[3] This decision is merely one in a long line of United States Supreme Court opinions expanding the application of the rule announced in *Batson*. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31, 114 S. Ct. 1419, 1422, 128 L. Ed. 2d 89, 98 (1994) (finding the Equal Protection clause prohibits a party from using peremptory strikes on the basis of gender); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 616, 111 S. Ct. 2077, 2080, 114 L. Ed. 2d 660, 670 (1991) (extending *Batson* to apply to civil litigation as well as criminal litigation as it violates the equal protection rights of the jurors); *Hernandez v. New York,* 500 U.S. 352, 355, 111 S. Ct. 1859, 1864, 114 L. Ed. 2d 395, 403 (1991) (applying *Batson* to prohibit the use of peremptory strikes to remove jurors on the basis of their ethnicity); *Powers v. Ohio*, 499 U.S. 400, 415, 111 S. Ct. 1364, 1373, 113 L. Ed. 2d 411, 428 (1991) (holding the defendant in a criminal case can raise a third party equal protection claim for jurors excluded by the prosecution, even if the defendant is a different race from the excluded jurors).

strikes to remove jurors on the basis of race. *McCollum*, 505 U.S. at 59, 112 S. Ct. at 2359, 120 L. Ed. 2d at 51.

B. Can a Judge Raise a *Batson* Challenge Sua Sponte?

The next issue this case raises is whether a judge can raise a *Batson* challenge sua sponte or whether it must wait on one of the parties to raise the issue. Both parties agree, as does the trial court, that it was the judge that brought up the *Batson* challenge in this case sua sponte. While this issue again is not raised by the parties, and Mootz appears to have conceded the issue at trial, we feel it is an important preliminary question considering the way the alleged error arose in the district court.

There is support for a trial judge taking such action.[4] This is because trial judges have a unique responsibility to "protect the rights of jurors to participate in our judicial system free from the taint of invidious discrimination." *State v. Evans*,

[4] Minn. Rules of Crim. Procedure 26.02(7)(2) (provides the court can make an objection to a peremptory challenge on the ground of purposeful discrimination); *Lemley v. State*, 599 So.2d 64, 69–71 (Ala. Crim. App. 1992) (holding a judge is authorized to conduct a *Batson* hearing even in the absence of a party objection, because racial discrimination in selection of jurors casts doubt on the integrity of the judicial process and places the fairness of criminal proceeding in doubt); *People v. Lopez*, 5 Cal. Rptr. 2d 775, 777–78 (Cal. App. Dep't Super. Ct. 1991) (asserting the courts have a responsibility to enforce the guarantee of an impartial jury drawn from a cross-section of the community and the courts must ensure people are not excluded from jury service on the basis of race in order to protect the legitimacy of the judicial system); *Brogden v. State*, 649 A.2d 1196, 1200 (Md. Ct. Spec. App. 1994) (finding because jury selection affects potential jurors and the entire community, the trial judge need not sit idly by when she observes what she perceives to be racial discrimination in the exercise of peremptory challenges); *Commonwealth v. Odell*, 607 N.E.2d 423, 425 (Mass. App. Ct. 1993) (finding a judge was entitled to raise *Batson* issue on his own motion); *People v. Bell*, 702 N.W.2d 128, 133–35 (Mich. 2005) (finding *Batson* and its progeny make clear the court may make an inquiry sua sponte after observing a prima facie case of purposeful discrimination to ensure the equal protection rights of individual jurors as trial courts are in the best position to enforce the statutory and constitutional policies prohibiting racial discrimination, and wrongly excluded jurors have little incentive to vindicate their own rights).

998 P.2d 373, 378 (Wash. Ct. App. 2000). In addition, trial courts are in the "best position to enforce the statutory and constitutional policies prohibiting racial discrimination." *Bell*, 702 N.W.2d at 135. However, most states continue to require the court to follow the steps of *Batson* even when the court initiates the challenge sua sponte. Thus, when the judge raises the issue on his or her own, he or she first must make a finding on the record that a prima facie case of discrimination has been established before demanding an explanation.[5]

While we recognize the majority of the states that have addressed the issue and have held a trial judge has the authority to raise a *Batson* challenge sua sponte and need not wait for a party to first make an objection to address the issue, we need not decide that issue here. For even if the trial judge can raise the issue sua sponte, the judge must still follow the procedure laid out in *Batson* and its progeny.

If purposeful discrimination is suspected, a three step process is employed to determine whether a party is using its peremptory strikes in a discriminatory manner. *Knox*, 464 N.W.2d at 448. The opponent of the strike must first establish a prima facie case of purposeful discrimination. *Id*. This can be

[5] *People v. Rivera*, 879 N.E.2d 876, 879–87 (Ill. 2007) (holding the trial judge has the authority to raise a *Batson* challenge sua sponte but may do so only when a prima facie case of discrimination is abundantly clear); *Williams v. State*, 669 N.E.2d 1372, 1382 (Ind. 1996) (holding a judge should normally wait for a party to object before deciding whether a prima facie case has been made under a *Batson* challenge, but intervention is authorized when a prima facie case is abundantly clear with respect to a particular juror); *Hitchman v. Nagy*, 889 A.2d 1066, 1072–74 (N.J. Super. Ct. App. Div. 2006) (holding the trial judge has the authority to raise the *Batson* challenge sua sponte, but must be careful to only raise the issue after identifying a prima facie case of discrimination); *Evans*, 998 P.2d at 383–84 (holding a judge can raise the *Batson* issue sua sponte, but may only do so when a prima facie case of purposeful discrimination exists). *See also Doe v. Burnham*, 6 F.3d 476, 481 (7th Cir. 1993) (stating in dicta that a judge should normally what for an objection before intervening to set aside a peremptory challenge, but may invade sua sponte in narrow circumstances).

established by showing the proponent's use of its strikes, the questions asked and statements made by counsel in voir dire, or any other relevant circumstance that raises an inference the proponent is seeking to exclude jurors on the basis of their race, ethnicity, or gender. *Id*. Where the court, as opposed to a party, raises the issue, it is important for the court to articulate on the record that it has found a prima facie case of discrimination and the grounds for that finding. *Rivera*, 879 N.E.2d at 879.

Once a prima facie case has been made, the burden of production shifts to the proponent of the strike to articulate a clear, specific, and neutral explanation for the strike. *Knox*, 464 N.W.2d at 448. At this stage of the test, the proponent need not offer an explanation that is persuasive or even plausible. *Purkett v. Elem*, 514 U.S. 765, 767–68, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834, 839 (1995). The issue at this stage is simply the facial validity of the explanation offered. *Id*. "Unless discriminatory intent in inherent in the [proponent's] explanation, the reason offered will be deemed race neutral." *Id*.

The final step requires the court to determine whether the opponent of the strike has carried its burden to prove purposeful discrimination by the proponent. *Id.* at 767, 115 S. Ct. at 1770–71, 131 L. Ed. 2d at 839. It is at this stage that the trial judge can choose to disbelieve silly or superstitions reasons given by the proponent as merely pre-texts for purposeful discrimination. *Id.* at 768, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839. But the ultimate burden of persuasion remains with and never leaves the opponent of the strike to demonstrate the proponent is using his strikes to discriminate on the basis of race, ethnicity, or gender. *Id.*

We must now determine whether the trial court complied with the *Batson* three-step process in this case.

C. Did the Trial Court Comply with the *Batson* Three-Step Process?

Based on our review of the record in this case, the trial court did not follow the procedure laid out in *Batson* and affirmed by our courts. *Griffin,* 564 N.W.2d at 375.

First, the trial court informed the parties at a sidebar before peremptory strikes were even underway that it observed three minority jurors, and in its opinion, only one of them was "strikeable" based on the answers given in voir dire. The court inserted itself into the jury selection process dictating who the parties could and could not strike. This procedure does not comply with the *Batson* three-step process. When one of the "non-strikeable" minorities was stricken by Mootz, the trial court demanded an explanation. The court did not articulate on the record that it found a prima facie case of discrimination before demanding an explanation for the strike from Mootz. This was in error. As the New Jersey Superior Court stated in *Hitchman v. Nagy*,

> Trial courts "must be cautious not to discourage the [attorneys] from using peremptory challenges in all proper instances to further, though not to undermine, the right to trial by an impartial jury." Requiring the trial court to identify a prima facie case of discrimination before initiating a Batson inquiry will avoid a chilling effect on counsel's further exercise of peremptory challenges.

889 A.2d at 1074 (citation omitted). In addition, we cannot infer a prima facie case of discrimination was established simply by noting Mootz struck one of the Hispanic jury panel members. The Iowa courts have held a prima facie case is

not established simply because a minority juror is stricken even if it is the only minority on the panel. *Knox*, 464 N.W.2d at 448. On the record before us, we see no prima facie case of discrimination.

However, the fact the trial court failed to articulate a prima facie case of purposeful discrimination on the record does not end our inquiry. The U.S. Supreme Court has held where a party offered a race-neutral explanation for a peremptory challenge and the trial court ruled on the ultimate question of intentional discrimination, "the preliminary issue of whether [a party] had made a prima facie showing becomes moot." *Hernandez,* 500 U.S. at 359, 111 S. Ct. at 1866, 114 L. Ed. 2d at 404. Because Mootz did offer a race-neutral explanation for the strike and the court ruled on the ultimate issue, the court's failure to properly articulate a prima facie case in step one is not fatal. Thus, we turn now to determine whether the trial court properly addressed steps two and three of the *Batson* challenge.

The second step in the *Batson* challenge requires the proponent of the strike to articulate a clear, specific, and neutral explanation for the strike. *Griffin,* 564 N.W.2d at 375. The explanation offered does not need to be persuasive or even plausible and unless a discriminatory intent is inherent in the explanation, the reasons offered will be deemed race neutral. *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839.

Mootz gave two reasons for striking the juror in question. First, Mootz asserted the juror was formerly a bartender and because of this employment the juror would know when people were intoxicated. A peremptory strike explanation

based on the juror's employment has been found to be race neutral.[6] In this case, Mootz was charged with public intoxication and a bartender could have specialized knowledge of the effect alcohol has on persons who overindulge.

The second reason Mootz offered for striking this juror is the juror had previously been arrested by police and asserted during voir dire that he deserved to be arrested. Mootz interpreted this answer to imply the juror thought if the police acted it was because the arrestee deserved it. The court disagreed with this inference. However, our research has found that our courts have routinely accepted peremptory strikes based on a juror's prior criminal background as race neutral.[7] This is usually because those with prior convictions are more likely to have negative attitudes toward law enforcement and the prosecution. *Keys*, 535 N.W.2d at 785. Just because the inference Mootz wants to draw in the present case is the opposite of the justification previously given when jurors are struck because of prior convictions, does not make the reason any less race-neutral. We find Mootz offered clear and reasonably specific race-neutral explanations for his strike sufficient to satisfy the second step of the *Batson* analysis.

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[6] *See also U.S. v. Morrison*, 594 F.3d 626, 633–34 (8th Cir. 2010) (finding a sufficient race-neutral explanation was given when a juror was struck because her work allowed her to have contact with individuals who had drug additions and the juror may have personal knowledge about drugs or addicts); *and State v. Morales*, 804 A.2d 902, 920 (Conn. App. Ct. 2002) (holding the State properly exercised its peremptory strike on a bartender because of the juror's late night work schedule and the juror's general experience, work history, and "haphazard" life).

[7] *See Veal*, 564 N.W.2d at 807 (upholding the denial of a *Batson* challenge where one of the minority jurors was struck by the State because she failed to disclose her husband was prosecuted twice and sent to prison once by the same county attorney's office involved in the case); *State v. Keys*, 535 N.W.2d 783, 785 (Iowa Ct. App. 1995) (finding the *Batson* challenge was properly denied where the sole black juror was struck because of prior convictions).

However, the trial court did not agree with this conclusion. In fact, before the peremptory strikes were even made, the trial court informed the parties it had heard no sufficient reason during voir dire that would permit the three minorities on the jury to be stricken with peremptory challenges. The trial judge seemed to be looking for Mootz to offer a more persuasive reason for the strike when the judge asserted, "I didn't feel that that was a sufficient reason to—that the peremptory challenge could be exercised on him." The judge also asserted,

> There was no valid reason given for excluding him. He indicated he could be fair. He had some experience with the police when he was younger. He deserved, in his opinion, what he got and he didn't show any bias one way or the other.

Based on the judge's statements, it is clear to this court, the trial judge had made up his mind he wanted Hispanic representation on the jury because the victim in the case was Hispanic, and he was not going to allow either party to strike the Hispanic juror no matter what race-neutral explanation was offered. This action by the trial court was an improper application of the principles in *Batson.*

While the trial court can evaluate the persuasiveness of the race-neutral reason offered by the proponent of the strike in the third step of the *Batson* analysis, the court needs to remember "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Purkett*, 514 U.S. at 768, 115 S. Ct. at 1771, 131 L. Ed. 2d at 839. The court needs to determine if the peremptory strike was made on the basis of purposeful discrimination, not determine whether the proponent of the strike had a good reason to exercise it. If Mootz had been able to offer a good enough reason to show this juror was in fact biased by his past experience with police,

then the juror would be subject to a challenge for cause. Mootz does not have to meet the standard for a challenge for cause when simply exercising his statutory right to peremptorily strike a juror.

In addition to wrongfully requiring a persuasive reason under step two, the trial court also failed to state whether it thought Mootz was attempting to purposefully discriminate against Hispanics in using of his peremptory strikes as required by step three. Instead, the court was concerned the jury have a "proper mixture of backgrounds." We find this motivation improper under *Batson*. Having a diverse jury is an honorable goal, but the court should not deny a party the use of peremptory strikes to try to keep minorities on the jury any more than a party should use peremptory strikes to take minorities off the jury.

The Supreme Court of Michigan addressed this issue in *Pellegrino v. AMPCO System Parking*, 785 N.W.2d 45, 48 (Mich. 2010). There the trial judge informed the parties his goal was to have a jury that represented the racial composition of the county. *Pellegrino*, 785 N.W.2d at 48. The defense attempted to strike an African American female and plaintiff objected on the basis of *Batson*. *Id*. The defense counsel asserted he was striking the juror because she had twice been widowed and was grieving over the recent death of her mother. *Id*. The trial court did not allow the juror to be stricken finding the composition of the jury adequately represented the community. *Id*. The Michigan Supreme Court held,

> [T]he wrongful *inclusion* of a juror on account of race should be treated the same as the wrongful *exclusion* of a prospective juror on account of race. Each situation violates the constitutional command that jurors be selected pursuant to criteria that do not

> take race into account, each deprives a defendant of a jury that has been "indifferently chosen" in terms of race, and each involves the exercise of judicial power in support of a process in which race becomes dispositive in terms of who can serve on a jury.

Id. at 55; *see also U.S. v. Brown*, 243 F.3d 1293 (11th Cir. 2001) (finding defense counsel's use of peremptory strikes to achieve a more diverse jury violated *Batson* and its progeny because the attempted elimination of Caucasians from the jury was still race-based discrimination even if the defense counsel's goal was a more diverse panel). The trial court's goal to have "a proper mixture of backgrounds" on the jury is honorable, but refusing to allow a party to strike a juror solely because the juror is of a certain racial or ethnic background is just as discriminatory as allowing a party to strike a juror on that same basis. *Pellegrino*, 785 N.W.2d at 55. Where there has been no finding of purposeful discrimination, the court should not deny a party's statutory right to peremptorily strike a juror.

We find in this case, the trial court improperly applied the three-step process laid out in *Batson* and its progeny. The trial court wrongfully denied Mootz the use of his peremptory challenge, but we must now decide what remedy is appropriate for such an error.

D. What Remedy is Appropriate?

In *Rivera v. Illinois*, ___ U.S. ___, ___, 129 S. Ct. 1446, 1450, 173 L. Ed. 2d 320, 325 (2009), the U.S. Supreme Court ruled the proper remedy for the wrongful denial of a peremptory strike is up to the individual states to determine. This is because peremptory strikes are not guaranteed by the federal constitution. *Rivera*, ___ U.S. at ___, 129 S. Ct. at 1450, 173 L. Ed. 2d at 325. The Supreme Court has long recognized peremptory strikes can be withheld by

states completely "without impairing the constitutional guarantee of an impartial jury and a fair trial. *Id*. Because state law controls the existence and exercise of peremptory strikes, state law must determine the consequences of the erroneous denial of the strike. *Id*. In *Rivera*, the Illinois Supreme Court had applied the harmless error analysis applicable when its trial court wrongfully denied the defendant his peremptory strike. *Id*. at ___, 129 S. Ct. at 1452, 173 L. Ed. 2d at 327–28. The Supreme Court upheld this remedy finding the defendant got what due process required, "a fair trial before an impartial and properly instructed jury." *Id*. at ___, 129 S. Ct. at 1456, 173 L. Ed. 2d at 331–32.

Our courts once held prejudice is presumed when a trial court erroneously overruled a challenge for cause and the party used all of his peremptory strikes. *State v. Beckwith*, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951). However, this remedy was over ruled in *State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993), where the court found the presumption of prejudice no longer applied. There the court required the party to demonstrate the denial of the challenge for cause resulted in a juror being seated who was not impartial. *Neuendorf*, 509 N.W.2d at 746. Now the court requires the party to show:

> (1) an error in the court's ruling on the challenge for cause; and (2) either (a) the challenged juror served on the jury, or (b) the remaining jury was biased as a result of the [party's] use of all of the peremptory challenges.

State v. Tillman, 514 N.W.2d 105, 108 (Iowa 1994).

Applying *Neuendorf* to this case, we find Mootz must demonstrate he was prejudiced by the failure of the court to allow him to strike the juror in question from the jury. A review of the record in this case reveals Mootz did not suffer

prejudice by the court's denial of his peremptory challenge. The evidence was uncontroverted Mootz struck the police officer in the face. While Mootz did not recall the person he struck was wearing a police uniform, every eyewitness that testified confirmed the officer was wearing his uniform and arrived in a marked police car. We find no rational jury would have acquitted Mootz of the offense of assault on a police officer causing bodily injury, and thus, Mootz suffered no prejudice by the court's wrongful refusal to strike the juror in question. *See Rivera*, 879 N.E.2d at 890–91.

AFFIRMED.

Huitink, S.J., concurs; Potterfield, J., dissents.

POTTERFIELD, J. (dissenting)

I write separately to disagree with the majority's reliance on *State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993), to conclude that Mootz must show actual prejudice from the wrongful denial of his peremptory strike. Our supreme court in *Neuendorf* did abandon the automatic reversal rule for wrongful denial of challenges for cause from *State v. Beckwith*, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951), stating "the proper focus when the impartiality of a jury is questioned is the jury that ultimately sat." 509 N.W.2d at 746-47 (citing *Ross v. Oklahoma*, 487 U.S. 81, 86, 108 S. Ct. 2273, 2277, 101 L. Ed. 2d 80, 88 (1988)). *Neuendorf* is factually distinguishable from the present case. In *Neuendorf*, although the court erred in denying a challenge for cause, the challenged juror was ultimately removed by peremptory strike and did not sit on the jury.[8] The *Neuendorf* court found it would no longer presume prejudice "from the fact that the defendant has been forced to waste a peremptory challenge." *Id.* at 747. Mootz, on the other hand, was not allowed to use a peremptory challenge and was convicted by a jury that included the juror whom he should have been allowed to strike peremptorily. His right to a fair and impartial jury is implicated. *Neuendorf* does not govern the result here.

The importance of peremptory strikes, although not constitutionally required, was recognized by the Supreme Court in *Swain v. Alabama*, 380 U.S. 202, 219, 85 S. Ct. 824, 835, 13 L. Ed. 2d 759, 772 (1965) ("Although there is

[8] This factual premise is common in cases where the court erred in denying a challenge for cause. *See United States v. Martinez-Salazar*, 528 U.S. 304, 120 S. Ct 774, 145 L. Ed. 2d 792 (2000); *Ross*, 478 U.S. at 86, 108 S. Ct. at 2277, 101 L. Ed. 2d at 88; *Beckwith*, 242 Iowa at 235, 46 N.W.2d at 24.

nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges, nonetheless the challenge is one of the most important of the rights secured to the accused.") (internal citations and quotations omitted). The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenges are a necessary part of trial by jury. *See Lewis v. United States*, 146 U.S. 370, 378, 13 S. Ct. 136, 139, 36 L. Ed. 1011, 1014 (1892) (referring to "the right of peremptory challenge" as "essential in contemplation of law to the impartiality of the trial."). "[F]or it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose." *Id.*

The United States Supreme Court did not retreat from *Swain* in *Rivera v. Illinois* when it ruled, "[A] principal reason for peremptories . . . is to help secure the constitutional guarantee of trial by an impartial jury." ___U.S. ___, ___, 129 S. Ct. 1446, 1454, 173 L. Ed. 2d 320, 329-30 (2009) (citing *Martinez-Salazar*, 528 U.S. at 316, 120 S. Ct. at 776, 145 L. Ed. 2d at 803) (internal quotations omitted).

However, the *Rivera* court approved the Illinois Supreme Court's application of the harmless error rule to the wrongful denial of a peremptory strike,[9] recognizing the right of the states to determine the relief to be granted when a trial court denies a peremptory challenge.

> If a defendant is tried before a qualified jury composed of individuals not challengeable for cause, the loss of a peremptory

[9] Under the harmless error analysis, the State must show beyond a reasonable doubt the jury verdict would have been the same absent the error. *See People v. Rivera*, 810 N.E.2d 129, 180 (Ill. App. Ct. 2004). The majority here places the burden of proving prejudice on Mootz.

> challenge due to a state court's good-faith error is not a matter of federal constitutional concern. Rather, it is a matter for the State to address under its own laws.

Id. at ___, 129 S. Ct. at 1453, 173 L. Ed. 2d at 328.

Mootz does not argue the court's erroneous denial of his peremptory strike is a violation of the federal or state constitution. Mootz argues the deprivation of a defendant's right to a peremptory challenge requires automatic reversal without a showing of prejudice. *See United States v. Annigoni*, 96 F.3d 1132, 1141 (9th Cir. 1996) ("Every other circuit to address this issue agrees that the erroneous deprivation of a defendant's right of peremptory challenge requires automatic reversal."); *State v. McLean*, 815 A.2D 799, 804 (Me. 2002) (noting a majority of states hold that the impairment of the right to a peremptory challenge under state law constitutes reversible error per se). *Compare Angus v. State*, 695 N.W.2d 109, 118 (Minn. 2005) (applying automatic reversal rule), *and State v. Vreen*, 26 P.3d 236, 238-40 (Wash. 2001) ("[E]rroneous denial of a litigant's peremptory challenge cannot be harmless when the objectionable juror actually deliberates."), *with People v. Bell*, 702 N.W.2d 128, 138-41 (2005) (rejecting automatic reversal rule and looking to state law to determine the consequences of an erroneous denial of a peremptory challenge).

Our supreme court has not ruled on the issue presented by Mootz, but it said in *Neuendorf* that the proper focus should be on the jury that actually determined the defendant's guilt or innocence. Mootz's jury included a juror he should have been allowed to peremptorily strike. I would reverse.